APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES, *Petitioner*

v.

DOUGLAS HILDEBRANT, ET AL.,

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1976

CERTIORARI GRANTED JANUARY 17, 1977

APPENDIX

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IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT,
ET. AL.,

Defendants.

AMENDED COMPLAINT
—filed October 21, 1974

Plaintiff states:

1st Claim For Relief

1. At all relevant times, the Defendant City and County of Denver was a municipal corporation organized under the laws of the State of Colorado.

2. At all relevant times, Douglas Hildebrant was a member of the Denver Police Department, an agent, servant and employee of the City and County of Denver, and was acting within the course and scope of his agency and employment.

3. On or about February 5, 1972, the Defendant Hildebrant, behind a day care center located at 2824 Glenarm Street, Denver, Colorado, did intentionally and wrongfully shoot Larry Jones in the back of the head, killing him.

4. Hildebrant's actions were accompanied by a willful and wanton disregard for the rights and feelings of Larry Jones and his mother Ruby Jones, and were accompanied by aggravated circumstances.

5. At the time of his death, Larry Jones was 15 years old and had a life expectancy of 54.95 years.

6. As a result of the death of her son, Ruby Jones lost his comfort, companionship, society protection and income. Additionally, Mrs. Jones incurred funeral and burial expenses, and suffered severe mental anguish, all to her damage in the sum of $1,500,000.00.

2nd Claim for Relief

7. Plaintiff incorporates by reference paragraphs 1–6 of this Complaint.

8. In shooting Larry Jones, Douglas Hildebrant was negligent in one or more of the following respects:

a. In not knowing or suspecting the decedent Larry Jones of being less than 18 years of age.

b. In using deadly force when not attacked.

c. In using deadly force when no other person was attacked with deadly force.

d. In using unreasonable means to prevent escape.

e. In using unreasonable and excessive force.

f. In failing to exhaust every other reasonable means of apprehension of Larry Jones before resorting to the use of firearms.

9. As a direct and proximate cause of Hildebrant's negligence, Ruby Jones has been injured as stated above.

WHEREFORE, Plaintiff prays for relief as stated more fully below.

3rd Claim for Relief

10. Plaintiff incorporates by reference paragraphs 1–9 of this Complaint.

11. At all times, Ruby Jones was and is a citizen of the United States and of full legal age.

12. During all times mentioned in this Complaint, Douglas Hildebrant while acting under color of law, intentionally deprived the Plaintiff of her rights, security and liberty secured to her by the Constitution of the United States, including but not limited to:

a. Her child's right to life;

b. The right to her child's freedom from physical abuse, coercion, intimidation, and physical death; and

c. Her right to her children's equal protection of the laws.

13. As a direct and proximate cause of Hildebrant's actions, Ruby Jones has been injured as stated above.

WHEREFORE, Plaintiff prays damages in the amount of One Million Five Hundred Thousand Dollars ($1,500,000.00), special damages, exemplary damages in the amount of Five Hundred Thousand Dollars ($500,000.00), interest from the

time of filing the complaint, costs, expert witness fees, and such other relief as this Court may deem just and proper.

Respectfully submitted,
WALTER L. GERASH & DAVID K. REES

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IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs

DOUGLAS HILDEBRANT and BRIAN MORAN and THE CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants.

ANSWER
—filed Oct. 29, 1973

COME NOW the Defendants, Douglas Hildebrant and The City and County of Denver, by and through their attorneys, Wesley H. Doan and William J. Chisholm, Assistant City Attorney, and in answer to the Complaint of the Plaintiff affirm, allege, deny and aver as follows:

ANSWER TO FIRST CLAIM FOR RELIEF

1. In answer to paragraphs I and II of the First Claim for Relief, the Defendants admit the same.
2. In answer to paragraphs III, IV and VI of the Plaintiff's First Claim for Relief, the Defendants deny the same.
3. In answer to paragraph V of the Plaintiff's First Claim for Relief, the Defendants allege and aver they are without sufficient knowledge or information to form a belief as to the truth thereof and, therefore, deny the same.

ANSWER TO SECOND CLAIM FOR RELIEF

1. In answer to paragraph I of the Second Claim for Relief, the Defendants incorporate and adopt by reference their answers to paragraphs I, II and V of the First Claim for Relief as though set forth herein word by word.
2. In answer to paragraph III of the Second Claim for Relief, the Defendants admit that Douglas Hildebrant did shoot Larry Jones on February 5, 1972, and as to the remaining

allegations of said paragraph, deny the same.

3. In answer to paragraph IV and the sub-paragraphs thereof, the Defendants deny the same.

4. In answer to paragraphs V and VI of the Plaintiff's Second Claim for Relief, the Defendants deny the same.

ANSWER TO THIRD CLAIM FOR RELIEF

1. In answer to paragraph I of the Third Claim for Relief, the Defendants incorporate and adopt by reference their answers to paragraphs I, II and V of the First Claim for Relief as though set forth herein word by word.

2. In answer to paragraph III of the Third Claim for Relief, the Defendants allege and aver they are without sufficient knowledge or information to form a belief as to the truth thereof and, therefore, deny the same.

3. In answer to paragraph IV of the Plaintiff's Third Claim for Relief, the Defendants admit the same.

4. In answer to paragraph V, VI and VII of the Third Claim for Relief, the Defendants deny the same.

ANSWER TO FOURTH CLAIM FOR RELIEF

1. In answer to paragraph I of the Fourth Claim for Relief, the Defendants incorporate and adopt by reference their answers to paragraphs I, II, III, IV and V of the First Claim for Relief, and paragraphs I through VII of the Third Claim for Relief as though set forth herein word by word.

2. In answer to paragraphs II and III of the Fourth Claim for Relief, the Defendants deny the same.

AFFIRMATIVE DEFENSES TO ALL CLAIMS FOR RELIEF

1. Said claims fail to state a claim upon which relief can be granted.

2. That at all times pertinent to the allegations of the Plaintiff's Complaint, the Defendants, Hildebrant and Moran, were acting in the course and scope of their employment as police officers for the City and County of Denver, State of Colorado, and were in the process of attempting to apprehend a fleeing felon who had committed violations of law in their presence contrary to the provisions of the Ordinances of the

City and County of Denver and the Statutes of the State of Colorado and used no more force than was reasonably necessary in an effort to apprehend the decedent, Larry Jones, who was then and there a fleeing felon.

3. That at all times pertinent to the allegations of the Plaintiff's Complaint, the Defendant, Hildebrant, acted in self defense, having reason to believe that at the time of the incident described in Plaintiff's Complaint he was attempting to apprehend a fleeing felon and that his own life was placed in danger from use of deadly force by the decedent, Larry Jones.

4. That the Defendant, Brian Moran, did not commit any assault on the person of the decedent, Larry Jones, or batteries.

WHEREFORE, having fully answered the allegations of the Plaintiff's Complaint, the Defendants respectfully pray that this Honorable Court enter judgment in their behalf and against the Plaintiff thereon and for their costs of the within action and for such other and further relief as to the Court may seem proper in the premises.

THE DEFENDANTS REQUEST A TRIAL OF ALL ISSUES TO A JURY OF SIX.

Wesley H. Doan and William J. Chisholm, Assistant City Attorney

By _____
Attorneys for Defendants, Douglas Hildebrant and
City and County of Denver
3120 So. Wadsworth Blvd.,
2 Denver, Colorado 80227
986–1536

ADDRESSES OF DEFENDANTS:

Hildebrant
c/o Denver Police Department
13th and Champa Streets
Denver, Colorado 80204

City and County of Denver
City and County Building
Denver, Colorado 80202

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and BRIAN MORAN, and THE CITY AND COUNTY OF DENVER, a municipal corporation,
Defendants.

MOTION FOR REDUCTION OF PRAYER OF COMPLAINT— filed Feb. 13, 1974

COME NOW the Defendants above named and herewith move this Honorable Court to enter its Order reducing the prayer of the Plaintiff's Complaint on each claim for relief to the amount of $45,000.00 and

AS GROUNDS THEREFOR show unto the Court as follows:

1. That the prayer of each claim for relief presently exceeds the sum of $45,000.00 and the nature of the Plaintiff's Complaint is that of a wrongful death action filed on behalf of the surviving mother for the alleged wrongful death of her son who was at the time of his death, fifteen years old.

2. That at the time of the death of the decedent for which the Plaintiff seeks recovery in the within action, the Plaintiff was not a dependent mother and, therefore, is not entitled to recovery beyond the sum of $45,000.00.

WHEREFORE, the Defendants respectfully pray that this Honorable Court enter its Order reducing the prayer of each claim of the Plaintiff's Complaint to the statutory limit of $45,000.00.

Wesley H. Doan and
William J. Chisholm

By _____
Attorneys for Defendants
3120 So. Wadsworth Blvd.,
#2 Denver, Colorado 80227
986–1536

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO COURTROOM NO. 3

Civil Action No. C–39926

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and BRIAN MORAN and THE CITY AND COUNTY OF DENVER, a Municipal corporation,
Defendants.

MEMORANDUM OPINION and ORDER —filed Sep. 11, 1974

On October 15, 1973, Plaintiff filed a civil complaint against police officers Douglas Hildebrant (Hildebrant), Brian Moran (Moran) and the City and County of Denver (The City), alleging four claims for relief, all arising out of the shooting and consequent death of Plaintiff's son by Defendant Hildebrant. Those claims for relief were based upon (1) battery, (2) negligence, (3) violation of civil rights and (4) conspiracy to violate civil rights.

Defendants' answers admit that Hildebrant did shoot Plaintiff's son (Larry Jones) on February 5, 1972 and admit that Defendant acted under color of state law and that the individual defendants were acting within the course and scope of their employment. Defendants assert that Hildebrant acted in self defense and used no more force than was reasonably necessary in an effort to apprehend the decedent.

During the course of discovery, several matters have already been resolved. Plaintiff's subpoena of the minutes of the Grand Jury investigation of the shooting incident was quashed and Plaintiff's motion for production of the transcript of the testimony before that Grand Jury was granted by Judge Kingsley.

Defendant Hildebrant objected to Plaintiff's interrogatories numbered 4, 11, 15, 19, 20, 21, 22, 23, 25 and 26 and on oral deposition he refused to answer questions numbered (a) (b) and (c) (p. 10, 1.12; p. 52, 1.2; and p. 15, 1.15 of the transcript, respectively.) The City objected to and re-

fused to answer Plaintiff's written Interrogatories numbered 8, 17, 23, 28 and 29.

Plaintiff moved to compel answers to these questions, pursuant to Rule 37, C.R.C.P. On June 28, 1974, oral arguments were heard and this Court: (1) denied Plaintiff's Motion with respect to Interrogatories number 4, 11, 15, 19, 20, 21, 22, 23, 25 and 26, submitted to Hildebrant; (2) denied Plaintiff's Motion with respect to Interrogatory number 8 served upon the City; (3) denied Plaintiff's Motion with respect to question (b) asked of Hildebrant at his deposition and; (4) reserved its ruling on the other two questions asked of Hildebrant at his deposition and on Interrogatories number 17, 23, 28 and 29 which were submitted to the City subsequent to that date, the City has answered and withdrawn its objection to Interrogatories number 17, 28 and 29. Therefore, the questions relating to Plaintiff's Motion to Compel Discovery remaining for disposition are the propriety of compulsion of answers: (1) to Plaintiff's questions (a) and (c) on oral deposition of Hildebrant and (2) to Plaintiff's Interrogatory Number 23, submitted to the City. The information sought relates to the existence and substance of any complaints against Hildebrant or Moran during their employment with the Denver Police Department prior to the incident which is the basis of this action. Plaintiff asked, in Interrogatory number 23 to the City, "Were there any complaints, either in writing or verbally, concerning the performance, as police officers, of either Officer Hildebrant or Officer Moran during their employment as officers of the Denver Police Department prior to the incident in question?" Plaintiff asked Hildebrant, an oral deposition, "Have you ever been subject to any disciplinary action since you have been in the Denver Police Department?" and "All right, now, have you ever been disciplined prior to February 5, 1972 for using excessive force on a subject?" In response to Plaintiff's Motion to Compel Answers to these three questions, Defendants assert that the information sought is privileged.

Defendants have also moved for an Order reducing Plaintiff's prayer for relief. Plaintiff seeks relief in the amount of One Million Five Hundred Thousand Dollars special damages and Five Hundred Thousand Dollars in exemplary damages. Defendants seek to reduce Plaintiff's claim for relief to $45,000.00 in accordance with the Colorado Wrongful Death Act (C.R.S. 1963, 41–1–1 *et seq.*) Plaintiff has stipulated to a reduction in the amount of her prayer with respect to the claims based upon state law, but asserts that the Colorado Wrongful Death Act does not limit the amount or type of damages available under the Federal Civil Rights Act.

QUESTION I.

Does Plaintiff's Discovery seek material which is privileged under the Colorado Open Records Act or Under the Common Law?

Defendants object to the discovery of the existence and history of civilian complaints filed against Hildebrant or Moran as being statutorily exempted from discovery, under the Open Records Act, 1969 Perm. Supp., C.R.S., 1963, 113–2–4 and under the common law.

Defendants' objection based upon the Open Records Act is not well founded. At the outset, it should be noted that this argument is inapplicable to the questions asked of Hildebrant; those questions did not seek access to any public records, although the information sought parallels information available in police department files. The Supreme Court of Colorado, in *Cervi and Co. v. Russell*, 519 P.2d 1189, distinguished between the right to receive information from public records, which is the subject of the Open Records Act, and the right to obtain the same information from other sources, which is unaffected by the Open Records Act. In adopting the reasoning of the Court of Appeals, the Court said: " 'The freedom of the press and Cervi's right to publish and disseminate birth and death information are not at issue here. The only issue is Cervi's right to receive this information from the Department of Public Health and the duty of that department to preserve the confidential nature of its records. Cervi is at liberty to publish the information, but must obtain it from other sources.' " *Cervi & Co. v. Russell*, *supra*. Thus, although the Open Records Act may have some applicability to discovery of the police files, it does not apply to discovery of Hildebrant or Moran's history from their own mouths.

Moreover, the Open Records Act does not limit legitimate discovery in a civil action. It is clear that the Act was intended to broaden public access to public records, not to create new statutory privileges. One of the purposes of the Act was to eliminate the necessity of a showing of special interest as a pre-requisite to access to public records. The

committee of the Colorado Legislative Council charged with the responsibility of researching the need for and drafting an open records act found that, historically, a showing of special interest was a pre-requisite to access to public records. The committee also found no assurance that this requirement would be eliminated by the Colorado Courts. *Colorado Legislative Council, Research Publication No. 126*, p. XI. Thus, the Open Records Act is a legislative response to the felt need to eliminate the requirement of special interest for access to public records. The Act reflects this purpose by declaring as general policy that all public records shall be open for inspection by "any person." And the declaration of policy accompanying the bill included an express declaration of this policy. *Research Publication No. 126*, p. XIII. Some exceptions to this rule of general access were made where a need for confidentiality was shown. It is clear that the exceptions to the Open Records Act policy relied upon by Defendants are exceptions to the general policy granting free access to "any person." The Act creates no new privilege where, as here, the person seeking access to public records has a special interest in the records, as required by the law prior to the enactment of the Act.

This interpretation of the Act is consistent with *Losavio v. Mayber*, 496 P.2d 1032 (1972), wherein it was held that the police files of prospective jurors were public records under the Act. In Losavio, Defendants' attorney learned that the police department was making the conviction records of prospective jurors available to the District Attorney, but that those records were not made available to defendants' attorney. Losavio sought to have the actual police files and records opened to inspection by the general public. In denying Losavio access to the actual police files, the Court noted that the files contained information which went far beyond the purposes for which jury lists are properly used, and beyond the information provided to the District Attorney. However, the Court found no meritorious reason for denying Losavio access to those elements of the police files which were provided to the District Attorney.

Under this interpretation of the Act, the other two cases cited by Defendant, *Cervi & Co., supra* and *Denver Publishing Co.*, 519 P.2d 1189, are inapplicable to this issue because the Plaintiffs in those actions were seeking public records as members of the general public and not as interested persons. There is no support for a finding of

privilege for police files or personnel records under the Act where those records are sought in legitimate discovery in a civil action.

However, a finding of no statutory privilege under the Act is not dispositive of Plaintiff's motion; Defendants also assert privilege under the common law.

The case of City of *Los Angeles v. Superior Court*, 33 Cal.App. 3rd 778, 109 Cal.Rptr. 365, cited by Defendants in support of a common law privilege, does not support such a privilege. Although the facts in this case closely parallel those in *City of Los Angeles*, a common law privilege may not be inferred from that case, since the privilege upheld in *City of Los Angeles* was based upon a California statute. California Evidence Code Sec. 1040 provides:

> "(a) . . . . 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed to the public. . . .
>
> "(b) A public entity has a privilege to refuse to disclose official information, ... if the privilege is claimed by a person authorized by the public entity to do so and . . . (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice, ..." The Court's analysis in this case revolved completely around the application of this section; the case gives no indication of the existence of a common law privilege in California."

Nor are Defendants' references to the encyclopedias and the authority contained therein convincing on this issue. One thing that is clear from the encyclopedias is that the law is not clear or uniform among the fifty states on this point. For example, Defendants accurately cite *Am Jur* 2d to the effect that police records are secret and not open to common inspection (66 *Am Jur* 2d, Records and Recording Laws §27), but there is also authority (23 *Am Jur* 2d, Depositions and Discovery, §175) for the more specific point that police records are discoverable in a civil action.

The Court has been referred to no Colorado cases which support a common law privilege for police records or personnel files; nor has it found any support in its own review of the law. In the absence of clear authority from other jurisdictions and in light of Colorado's comprehensive statute granting privileges in a variety of confidential relationships (C.R.S., 1963, 154–1–7), it is not appropriate for this Court to fashion such a privilege.

Moreover, the Court believes that C.R.S., 1963, 154–1–7 (6) adequately provides protection to the confidential nature of complaints against police officers and of the internal investigations and disciplinary measures of the police department. The statute provides:

> ". . . . a person shall not be examined as a witness in the following cases:
> (6) A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court would suffer by the disclosure."

Although Defendants have not specifically sought the protection of this section, their assertions of privilege are sufficient to invoke its protection, with respect to the questions asked of the City. Therefore, the Court will direct that within 20 days the information sought from the City be submitted to the Court for determination of its relevancy to this case, and the importance of its confidentiality, before that information is released to Plaintiffs. As to the questions asked of Defendants Moran and Hildebrant, the Court directs that answers be given within 20 days.

QUESTION II.

Do the Colorado limitations on damages in wrongful death actions apply to Plaintiff's claims for relief?

Since Plaintiff has stipulated to reduction of her prayer with respect to the claims based upon state law, the only question left for determination is the applicability of the Colorado limitations on damages in wrongful death actions to Plaintiff's claims under the Federal Civil Rights Act, 42 U.S.C. §1983.

Plaintiff acknowledges that she would have no claim of right at common law; at common law there is no right arising out of the death of a person, enforceable by the surviving parties. Moreover, Plaintiff does not assert that this rule has generally been abrogated by the Federal statutory law. However, Plaintiff does assert that the Colorado Wrongful Death Act (C.R.S., 1963, 41–1–3) grants to survivors a statutory right, the deprivation of which is actionable under 42 U.S.C. §1983.

The Colorado Wrongful Death Act (C.R.S., 1963, 41–1–1 *et seq*) does create a new cause of action but it does not generally abrogate the common law rule that no person may recover for

the death of another. *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930.

The Federal Civil Rights Acts do not abrogate the common law rule. 42 U.S.C. §1988 does provide that where the Federal law is inadequate to carry the Civil Rights Act into effect, whatever remedies state law provides will also be available in Federal Courts. *This provision has been interpreted as permitting suits to be brought by survivors in Federal Courts to enforce a decedent's civil rights where the forum state provides for survival of a decedent's cause of action. Brazier v. Cherry*, 293 F.2d 401, (10th Cir. 1961). 42 U.S.C. §1988 does *not* create any rights in survivors broader than those which state laws provide; *it merely permits the use of state remedies in Federal Courts.*

In this case, the only effect of §1988 is to permit Plaintiff to bring her wrongful death claim in Federal Court, alleging violation of her son's constitutional rights. By incorporating C.R.S., 1963, 41–1–1 *et seq* into Federal law, §1988 permits Plaintiff to bring a wrongful death action in Federal Courts even though such actions are not generally authorized in Federal Courts. Since Plaintiff does not seek access to Federal Courts, her rights in the present case have not been enhanced by §1988.

Moreover, in incorporating the Colorado authorization of wrongful death actions into Federal law, §1988 incorporates the whole of that law, including the limitations on that right. In *Salazar v. Doud*, 256 F.Supp. 220 (D.C. Colo. 1966) the Plaintiffs invoked §1988 to assure the survival of a decedent's claim of violation of his civil rights under §§1983 and 1985. The Federal Court restricted the elements of recovery to those set forth in the Colorado Survival Statute C.R.S. 1963, 153–1–9.

This result (i.e. having a state limitation on damages apply to a federal claim) is not anomolous. For example, in *Barton v. U.S.*, 330 F.2d 466 (10th Cir. 1964), the Colorado statutory limitation on gross recovery in wrongful death actions was held applicable to a cause of action under the Federal Tort Claims Act.

Since Plaintiff is not a dependent mother, her claim for relief is limited to $45,000, (1969 Perm.Supp., C.R.S. 1963, 43–1–3) and she is governed by the net compensatory loss standard applicable to wrongful death actions.

THEREFORE, IT IS ORDERED that Defendants' Motion

to Reduce Plaintiff's General Damages to $45,000.00 is granted.

DONE AND SIGNED IN OPEN COURT this 11 day of September, 1974.

BY THE COURT:

District Judge

cc: David K. Rees, Esq.
Walter L. Gerash, Esq.
Attorneys for Plaintiff
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Denver, Colorado 80204

Wesley H. Doan, Esq.
Attorney for Defendants
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IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT,
ET. AL., *Defendants.*

MOTION AND STIPULATION —filed Oct. 21, 1974

COMES NOW the Plaintiff by and through her attorneys, Walter L. Gerash and David K. Rees and moves, pursuant to stipulation, that the Complaint presently before this Court be dismissed insofar as it applies to the Defendant Brian Moran, and that Plaintiff be permitted to amend her Complaint as per the copy attached hereto.

AS GROUNDS THEREFOR, Plaintiff states:

1. Through discovery procedures, she has obtained information not available to her at the time the original Complaint was filed.

2. The Complaint, as amended, more accurately reflects the basis of her injury.

IT IS EXPRESSLY UNDERSTOOD, that this Complaint, as amended, contains a prayer in the sum of $1,500,000.00 compensatory damages and $500,000.00 exemplary damages despite the fact that on September 11, 1974 this court granted Defendants motion to reduce the prayer of $45,000.00. In signing this Stipulation, counsel for the Defendants is in no way consenting to a modification of that order, and the larger prayer is included for the purpose of protecting Plaintiff's record.

IT IS FURTHER STIPULATED, that the Answer already filed by the Defendants in this action shall serve as an answer to the amended complaint, however, the Defendants may, at their option amend their answer to conform to the amended complaint.

Respectfully submitted,

WALTER L. GERASH &
DAVID K. REES
Attorneys for Plaintiff

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IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES, *Plaintiff,*

vs.

DOUGLAS HILDEBRANT, ET. AL., *Defendants.*

ORDER—filed Oct. 21, 1974

THIS MATTER having come before this Court, and the Court being fully advised in the premises hereby orders that the Plaintiff, Ruby Jones, may amend her complaint as per the Motion and Stipulation which has heretofore been filed in this matter.

DONE THIS 21 day of October, 1974.

BY THE COURT:

JUDGE

AND AFTERWARDS, and on to-wit, the 14th day of November, A. D. 1974, the following proceedings, inter alia, were had and entered of record in said Court, to-wit:

+ + +

JUDGE CHARLES GOLDBERG

RUBY JONES

vs.

DOUGLAS HILDEBRANT, ET AL

C–39926

ORDER:
TRIAL TO JURY RESUMED
DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S CLAIM FOR NEGLIGENCE—DENIED
DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S 3RD CLAIM FOR RELIEF—GRANTED
DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES—GRANTED
JURY INSTRUCTED
JURY RETIRES

At this day come again the said parties hereto, by their attorneys, respectively.

And the said jurors being now all here present, and in the jury box, the trial of the issues herein joined is resumed.

And thereupon, the said Defendant doth orally move the Court, at the conclusion of evidence, to dismiss Plaintiff's claim for negligence, and the Court now being sufficiently advised in the premises, doth deny said motion.

And thereupon, the said Defendant doth orally move the Court, at the conclusion of evidence, to strike Plaintiff's THIRD CLAIM for Relief on the grounds that it is redundant with FIRST CLAIM for Relief, and the Court now being sufficiently advised in the premises, doth grant said motion.

(THE 14TH DAY OF NOVEMBER, A. D. 1974)

And thereupon, the said Defendant doth orally move the Court, at the conclusion of evidence, to dismiss Plaintiff's claim for punitive damages, and the Court now being sufficiently advised in the premises, doth grant said motion.

And the said jurors having heard the evidence adduced herein as well on behalf of the said plaintiff and as of the said defendants and the arguments of counsel, and being duly instructed by the Court, retire to their room in charge of a sworn bailiff, to consider of their verdict herein.

And thereupon, IT IS ORDERED BY THE COURT that the Jury is to return on the 15th day of November, A. D. 1974, at the hour of 9:00 A.M. to resume deliberations.

And the said jurors, being each duly cautioned by the Court not to converse among themselves, nor with others, touching

the matters at issue herein, nor to listen to such conversation of others, nor to read nor hear read any publication bearing upon the same, are permitted to separate.

+ + +

PLAINTIFF'S TENDERED INSTRUCTION NO 1

INSTRUCTION NO._____

The $45,000 limitation which applies to the Plaintiff's claim for wrongful death, is not applicable to Plaintiff's claim for deprivation of her civil rights. There is no limitation to the award you may return on this claim, so long as the damages, if any, you find fairly and justly compensate the plaintiff and are supported by a preponderance of the evidence.

REQUESTED BY PLAINTIFF, &
REFUSED BY THE COURT
Date: Nov. 14, 1974

_____
JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 2

INSTRUCTION NO._____

If you find in favor of the Plaintiff, Ruby Jones, on her claim of deprivation of civil rights then you shall assess to her damages, insofar as they were proximately caused by the Defendant's actions, an amount which will reasonably and justly compensate her for her damages, if any.

In determining such damages you shall take into consideration the following:

1. Any pecuniary loss she may have suffered.
2. The emotional and mental distress she may have suffered.
3. The loss of companionship of her son.
4. The value of loss of her civil rights.

REQUESTED BY PLAINTIFF, &
REFUSED BY THE COURT
Date: Nov 14, 1974

JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 3

INSTRUCTION NO._____

Although damages must be measured by pecuniary loss to the Plaintiff, in fixing such loss you are not limited to proof of loss in dollars and cents, but may properly consider the pecuniary value of such non-economic interests of a family as loss of comfort, society and protection.

REQUESTED BY PLAINTIFF &
REFUSED BY THE COURT
Date: Nov. 14, 1974

JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 4

INSTRUCTION NO._____

When a person is deprived of a constitutional right, damages are presumed from the wrongful deprivation of it without evidence of loss of money, property, or any other valuable thing, and you may award damages based upon your own personal knowledge of that right.

REQUESTED BY PLAINTIFF, & REFUSED BY THE COURT
Date: Nov. 14, 1974

JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 5

INSTRUCTION NO._____

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or compensatory damages on her claim of deprivation of civil rights; and should further find that the act or omission of the Defendant, which proximately caused actual injury or damage to the Plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

REQUESTED BY PLAINTIFF, &
REFUSED BY THE COURT
Date: Nov. 14, 1974

JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 8

INSTRUCTION NO._____

In order to prove her claim of deprivation of civil rights, the burden is upon the Plaintiff to establish, by a preponderance of the evidence in this case, the following facts:

1. The Defendant, Douglas Hildebrant, knowingly shot Larry Jones wounding him in the head, as alleged;
2. The Defendant acted under color of law;
3. The acts and conduct of the Defendant, Douglas Hildebrant, of which Plaintiff complains, were knowingly done in such a manner as to deprive the Plaintiff of her Federal Constitutional right without due process of law.

REQUESTED BY PLAINTIFF, &
REFUSED BY THE COURT
Date: Nov. 14, 1974

_____
JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 11

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendant's act or omission, which proximately caused actual damage to the plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed, only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the condition under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

IN THE DISTRICT COURT
AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO
COURTROOM NO. 3

Civil Action No. C–39926

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and THE CITY AND COUNTY OF DENVER, a Municipal corporation,

Defendants.

EXCERPTS FROM TRIAL TRANSCRIPT
—November 11, 1974

MR. GEER: Your Honor pleases, number one, I think I submitted a case here in the informal discussion earlier. We would move that the issue of punitive damages be stricken from this case and no instruction given since they can't entertain it. And we would cite to the Court—of course, the Court is already familiar with it—*Herbertson v. Russell*, a 1962 case. I am sorry I don't have the Colorado citation (150 Colo. 110). I have the Pacific Reporter. 371 P. 2d 422. As the Court knows, that case stands primarily for one of the principal tenets of law in this state:

> ". . . . the damages to be awarded in a wrongful death case are compensatory only, and not exemplary in the sense that they are imposed as a penalty against the wrongdoer. Nor are they a solatium for the grief of the living occasioned by the death of their relative, 'however dear.' "

We would submit that the federal Civil Rights Act, §1983 and §1988, mentioned in the Third Claim for Relief of the Amended Complaint could only refer substantively to the Wrongful Death Statute in Colorado. And it would be redundant and repetitive and similar to the Second Claim for Relief—or, the First Claim for Relief, rather—which is based on intentional tort, I am sorry. And, therefore, that Claim for Relief should be stricken. It's superfluous. The only way that the Civil Rights Act would apply would be a jurisdictional question if the case were in Federal Court. And the law is clear, that even if it is in Federal Court, the court will look to

the state organic law or substantive law, in this case the Wrongful Death Statute, and apply that. As far as this Jury, we, the state court, when they have alleged a wrongful or a civil rights violation, I think that the Court would obviously have to follow the substantive law of the Colorado Wrongful Death Statute.

And I would mention to Your Honor two cases briefly here, *Sauls v. Hutto*, a 1969 case, in 304 Federal Supplement 124. This is a wrongful death action. And addressing this to that Federal Civil Rights Third Claim for Relief in the headnote, and then I'll go to the body of the decision very briefly.

> "Motion of 17-year-old boy who was shot by police officers while attempting to flee from crashed automobile when he had stolen could not recover against officers, under Civil Rights Act, on theory that police officers had violated state law in shooting son, inasmuch as Civil Rights Act protects only federal rights that are violated under color of state law. 42 U.S.C.A. §1983.
>
> "Fact that mother of 17-year-old boy who was fatally shot by police officers while attempting to flee from crashed automobile which he had stolen was entitled to recover damages for her son's death under state law pretermitted determination of her claim under Civil Rights Act that her son was deprived of his life without due process when officers killed him merely to protect property. 42 U.S.C.A. §1983."

The Court states in furtherance of that headnote No. 2 that:

> "The second basis for plaintiff's claim under Section 1983 is in effect that any time a person is killed by a law enforcement officer merely to protect property, he has been deprived of his life without due process of law, and, consequently, his federal constitutional rights have been violated. Since plaintiff is entitled to recover damages for her son's death under state law, determination of her federal constitutional claim is pretermitted because it would afford her no additional relief."

We are saying they are one and the same. Now, if he is entitled to recover under the state Wrongful Death Act, the Third Claim under the Federal Civil Rights Act is redundant or should be part and parcel of the Wrongful Death claim in the Second Claim for Relief.

Now, in addition, Your Honor—and this is a Connecticut case, *Perkins v. Salafia*, in the Federal District Court, a 1972 case, 338 Federal Supplement 1325.

> "The District Court, Blumenfeld, Chief Judge, held that complaint on behalf of individuals did not state cause of action under provision relating to civil action for deprivation of rights but complaint of administratrix on behalf of estate did state cause of action under Civil Rights Act."

Because we don't have that here—a survival action as this case here—it is a wrongful death statute.

> "Plaintiffs as individuals must allege deprivation of their own federally protected rights in order to state claim under Civil Rights Act. 42 U.S.C.A. §§1983 and 1988.
>
> "Where state did not provide for additional remedy to individuals whose relative was wrongfully slain, federal statute relating to proceedings in vindication of civil rights did not provide any remedy. 42 U.S.C.A. §1988.
>
> "Connecticut's wrongful death statute was wholly adequate to vindicate claim under federal statute relating to civil action for deprivation of rights."

The Court said in reference to that last language that:

> "Since Connecticut does not provide for an additional remedy for the plaintiffs in their individual capacities, one cannot be created by application of §1988 under Civil Rights Act."

The last I am paraphrasing.

> "The remedy Connecticut does provide is wholly adequate to vindicate the claim under §1983." Citing cases.

* * *

MR. REES: Your Honor, there are three claims in our Complaint. The first is battery, the second is negligence, the third is 1983.

We have no argument with the fact that *Herbertson v. Russell*, *Sauls v. Hutto*, and *Perkins v. Salafia* would all apply to the First and Second Claims for Relief, that we could not obtain punitive damages under the actions which are not federal 1983 actions; however, we feel that we are entitled to them under the Third Claim for Relief and we feel that is proper.

Let me comment for a moment on the two cases which Mr. Geer has commented on. Starting with *Perkins v. Salafia*. *Perkins v. Salafia*, which was quoted in my Brief that I submitted to this Court earlier in my motion on damages, stands for the proposition that where you have the survivorship statute that does not create an independent right in the survivors. They are merely suing on a right which the dead person had. And the Court in that case specifically distinguished *Galindo v. Brownell*, 255 Federal Supplement 930, Southern District of California, 1966, and pointed out that the Califor-

nia Wrongful Death Statute did create such a new independent right and therefore, Galindo did not apply to Connecticut, which did not. Colorado's Wrongful Death Statute creates a new independent right in Mrs. Jones. The wording of the statute so states; and there is a case, which, I believe, is *Moffatt, et al v. Tenney*, 17 Colorado 189, 30 Pacific 348, 1892, which states specifically that it creates an independent right in Mrs. Jones. So, *Perkins* is right on point and it explains exactly why Mrs. Jones can collect, whereas the Plaintiff in that case could not.

The second case that counsel mentioned, *Sauls v. Salafia*, this came out of Louisiana. And Mr. Geer referred to the headnotes. The first headnote states "Wrongful Death Action", and I think that is misleading, because when you start looking at the case, and you really look at the case, the case is brought pursuant to Article 2315 of the Louisiana Code, called "LIABILITY for Acts Causing Damage; Survival of Action." A copy of which I would hand to the Court at this point. And, from which it is clear that the Louisiana statute is also a survivorship statute and not a wrongful death statute, and therefore, I have no argument that the 1983 action in *Sauls v. Salafia* would be improper based exactly on the same reasons as *Perkins*, that there is no independent right created under that statute. Therefore, we feel that because there is no independent right created, those cases are improper.

Now, United States Supreme Court in *Sullivan v. Little Hunting Park*, that is at 396 U.S. 229 has stated that the existence of a statutory right implies the existence of all measures and appropriate remedies. And they went on further and said that compensatory damages for deprivation of a federal right are governed by a federal standard and provided by 42 U.S.C. §1988. This means as we read Section 1988 that both federal and state rules on damages may be utilized whichever better serves the policies expressed in the federal statute. "The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." The Colorado Wrongful Death Act is a statutory right that Mrs. Jones has. It gives her a right. That right, we allege, has been impaired by the improper shooting of her son, thereby violating her right to due process. It is therefore a deprivation of her federal constitutional rights; and because it is a deprivation of her federal constitutional rights, as the Supreme Court pointed out,

the federal measure of damages controls. And, as I stated, the federal cases, without exception, allow punitive damages in death cases. There is not a single case, to my knowledge, where there is a wrongful death action as opposed to a survivorship action where a court has held that one could not bring punitive damages in a case where there had been an intentional tort. And this is, of course, an intentional tort.

* * *

Therefore, we would oppose the opposition's Motion to Strike our Punitive Damages Claim; and we would also oppose their Motion to Strike the Federal 1983 Claim.

THE COURT: Okay.

Anything further?

MR. REES: No, Your Honor.

THE COURT: Okay.

Did that case that you just read from deal with a death case, do you know?

MR. REES: No, the *Sullivan v. Little Hunting Park* case is a racial discrimination case. It is not a death case.

THE COURT: All right.

MR. REES: Let me add for the record that the only death case that I have found which comes close to being on point is *Kozar v. Chesapeake & Ohio Railway Co.*, found at 320 Federal Supplement 335, in which John Kozar, a railroad worker, was killed while attempting to derail a train car. His wife, as the administratrix of his estate, alleged that the Railroad had committed a willful, wanton or reckless disregard for his safety. The Jury agreed and awarded her $120,000.00 in compensatory damages and $70,000.00 in punitive damages.

Now, that is not on point, but I think the logic of that case may apply to the case at bar.

* * *

The Court will rule as follows on all pending motions that were raised at the conclusion of the Plaintiff's case and now at the conclusion of all of the evidence.

The first motion raised by the Defendant was to Dismiss the Claim of Negligence that has been Asserted by the Plaintiff against the Defendants. That Motion will be denied. The Court feels that the Plaintiffs have established a prima facie case of negligence. The Court feels that although the Defend-

ant, Douglas Hildebrant, admitted shooting the Plaintiff's son, that that admission, in and of itself, does not predetermine any rights that the Plaintiffs may have by virtue of the proof that they have established in this case on the claim of negligence. The Court feels that the Plaintiff has established a prima facie case considering the evidence in the light most favorable to the Plaintiff. The Court recalls that the evidence elicited by the Plaintiff indicated that the police officer on the night in question, as he approached the building, was in the focus of some light that emanated from the building; that the deceased also was bathed in light as he exited from the Day Care Center. The Court feels that the issue of whether the police officer could, or should, have discerned what, if anything, was in the deceased's hand is an issue of fact. And, whether the police officer exercised due care in response thereto is a question of fact. The Court feels that there is also a question of fact as to whether the police officer failed to exhaust every other reasonable means of apprehension of the deceased before resorting to shooting him. And the court feels these are questions of fact for the Jury; and accordingly, the Motion of the Defendant to Dismiss the Plaintiff's Second Claim set forth in their Amended Complaint will be denied.

With reference to the Defendant's request that Count Three be dismissed by virtue of its being merged into Count One, the battery claim, the Court would make the following observations in reference thereto. The Court would note that Mrs. Jones, in her Third Claim for Relief, claims deprivation of her civil rights in three material respects. Number one, her child's right to life. Two, the right to her child's freedom from physical abuse, cohersion, intimidation and physical death. Three, her right to her child's equal protection of the law. Her claim under equal protection of the law is absurd at this juncture when considered in light of the evidence produced at trial. Her other claims, however, can only be coextensive with her son's rights in these areas; that is to say, she can have no greater rights to her son's life than he, himself, had to his own life. And to the extent that Larry Jones had inalienable rights to life and freedom from physical abuse, these rights are covered by substantive tort law which includes the defenses available under that law, particularly the defenses of self-defense and the fleeing felon laws. Therefore, the Court feels that in this case the Plaintiff's First and Third Claims for Relief are coextensive, congruent, redundant in this case when considered in the light of the evidence. The Court can

envision, however, where a case could arise where the state and federal claims are not redundant, but the Court does not feel that under the evidence established in this case that that has been established.

* * *

THE COURT: . . .

In this case the Colorado Wrongful Death Act does provide for the vindication of a decedent's rights, privileges and immunities by the bringing of an action by their survivors. The cause of action does not need to be state based. A claim for death arising out of the wrongful deprivation of the decedent's civil rights would be permitted equally with a claim for death arising out of breach of a state law mandated "standard of care". However, Mrs. Jones cannot successfully challenge in this case, in light of the evidence, the Colorado Wrongful Death Act as being inadequate to protect her rights, privileges and immunities of her son without also challenging the Federal Civil Rights Act on the same basis. Now, to the extent that the Colorado acts are inadequate to protect the decendent's rights, the federal statute is likewise deficient. So, since the only federal law which provides any law as to measure of damages recovery enforcing the civil rights of the decedent, and that part is set forth in 42 U.S.C. §1988, which provides for adoption in the federal law and state law remedies, thus in this case to the extent that Colorado law is not applicable, the Court feels that no recovery of any type is provided. So, in summary, what we have are claims in which the elements are virtually identical to that which are set forth in the First and Third Claim. The only substantive difference, really, is the Colorado state law issue which is admitted in this case. So, the Court feels that they are merged in the First Claim. And, the Plaintiff's Third Claim for Relief will be dismissed at this time.

MR. REES: On your last ruling, just for the record, we feel that since we were entitled to exemplary damages under the Federal Civil Rights Statute and that because of the fact that the statute limits damages to $45,000.00 for a child—which I think is unconstitutional—and also because the Court made a ruling of net pecuniary worth, that, in effect, denies Mrs. Jones' rights; and therefore the federal remedy for a whole recovery because the Constitution of the State of Colorado provides that where there is a wrong, there should be an

adequate remedy, and therefore, the Federal Civil Rights Statute can step in and give an additional remedy to overcome this situation. And coupled with the fact that the decedent was black and the Plaintiff is black and this is a ghetto area, and there the Jury can infer that this type of shooting wouldn't have taken place in East Denver, Southeast Denver, West Denver, or Lakewood. They can feel that the black was singled out for poorer treatment and more trigger-happy action than as against a white person. So, therefore, we feel that the Civil Rights Statute was made to add a dimension to those who are politically and economically oppressed. And, therefore, we feel that this Civil Rights Statute has a function as a supplement to the inadequate damages and to the unique denial of civil rights which are a factual issue in this case.

That's all I have.

* * *

All right, Gentlemen, are there any Instructions to be tendered at this time?

MR. REES: Yes.

Plaintiff tenders Instructions numbered 1 through 11. There was one Instruction not marked, and I marked it No. 11, and it is not at the tail end. So, let the record reflect we are tendering Plaintiff's Instructions No. 1 through No. 11.

THE COURT: The Court did not mark what you have marked No. 11 because I thought that was a continuation of page 2 what is marked Instruction No. 5. But, in any event, I have considered that together with all the other Instructions No. 1 through No. 10, and of course the one that is marked No. 11, and the Court feels either that they are incorrect statements of law applicable to this case, or they are already embodied within Instructions No. 1 through No. 28 which the Court will give. So, for those reasons the Court will refuse Plaintiff's tendered Instructions No. 1 through No. 11.

* * *

REPORTER'S CERTIFICATE

(Omitted in printing)

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO
COURTROOM NO. 3

Civil Action No. C–39926

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and THE CITY AND COUNTY OF DENVER, a Municipal corporation,

Defendants.

EXCERPTS FROM TRANSCRIPT OF HEARING —January 9, 1975

PROCEEDINGS

THURSDAY, JANUARY 9, 1975

WHEREUPON, the following proceedings were had and entered of record:

(WHEREUPON, the following transcript was prepared pursuant to No. 10 of the Designation of Record, which reads as follows, "Transcript of Judge's Order re: Motion for New Trial—denied.")

THE COURT: You may proceed, Mr. Rees.

(WHEREUPON, Mr. Rees, on behalf of the Plaintiff, argues his Motion for a New Trial.)

THE COURT: All right.

Did you have any response you wish to make?

MR. GOODWIN: Pardon me, Your Honor?

THE COURT: Do you wish to respond?

MR. GOODWIN: It is not necessary, Your Honor. I do have some cases that I can cite Your Honor about the question of damages, and that is all.

THE COURT: All right. I don't believe that is necessary—

MR. GOODWIN: Thank you.

THE COURT: —because I don't believe the damages were inadequate as a matter of law.

The Plaintiff's Motion for New Trial will be denied. The

Court has carefully considered the Motion for New Trial, together with the Brief filed by the Plaintiff in support of his Motion for New Trial. Considering the evidence in this case, it is obvious that, while the verdict is not large, the Court does not feel that it is grossly and manifestly inadequate as a matter of law, particularly in light of the fact that we have in Colorado the net pecuniary loss rule. The tangible out-of-pocket losses incurred by the Plaintiff as a result of the loss of her son as established by the evidence indicated that funeral expenses were approximately $1,000.00. And the evidence on that was not all that clear because there wasn't any documentary evidence as to what the funeral bill actually was, but I think everyone concedes, including the defense, that the funeral expenses were approximately $1,000.00 Now, over and above that the Plaintiff had to establish that she did suffer a net pecuniary loss under Colorado law; and there was some difference between the funeral expense and the amount of the award; and it is conceivable to the Court that perhaps the Jury did consider that that was the extent of the net pecuniary loss the Plaintiff did suffer as a result of the loss of her son. So, this Court cannot say, as a matter of law, that the verdict, while admittedly small, was grossly or manifestly inadequate. Accordingly, ground No. 1 is not well taken.

Ground No. 2, "The Court erred in dismissing Plaintiff's claim brought pursuant to 42 U.S.C. §1983," is not well taken. The Court will not comment further. The Court's reasons for dismissing this claim were articulated and enunciated in great detail during the course of this trial. No further comment needs to be made on that.

With reference to ground No. 3, namely, the failure of the Court to instruct according to Plaintiff's tendered Instructions No. 1 through No. 10, the majority of those deal, frankly, with the Claim brought pursuant to 42 U.S.C. §1983, which was dismissed. And, accordingly, the Court's reasons for not giving those Instructions that relate to the 1983 Claim were articulated at the time that the Court dismissed the Claim for 1983, and of course, it would be improper to instruct the Jury on a Claim that had been previously dismissed. The other Instructions that were tendered by the Plaintiff basically relate to the Plaintiff's Complaint that the net pecuniary loss rule is not the law in Colorado—or, rather, recognizing that it is the law in Colorado, should not be the law in Colorado. However, this trial court is bound by the net pecuniary loss rule; and accordingly, those Instructions that

seek to deviate in any way from the net pecuniary loss rule should not have been given; and accordingly, the Court does not find that it was error not to instruct according to Plaintiff's tendered Instructions that deviated from the net pecuniary loss rule. The other tendered Instructions, as the Plaintiff indicates, are really moot because the Jury has found in favor of the Plaintiff on the issue of liability. So, ground No. 3 will be denied.

And that will dispose of the pending Motion for New Trial. And you may seek review of this matter at this time, if you wish.

* * *

RUBY JONES

the Plaintiff herein, called as a witness in her own behalf, being first duly sworn by the Court Clerk, was examined, and upon her oath testified as follows:

DIRECT EXAMINATION

BY MR. GERASH:

.....

Q. Okay. Now, you indicated that Larry helped around the house like no other child you had?

A. That is right.

Q. Could you tell us the chores he did in the house?

A. Well, he cooked, he cleaned, he washed, he ironed. And, also, he loved to bake cakes. He baked more cakes than I did, because I don't like to bake cakes. And he was always baking a cake. And he also baked cakes from scratch.

Q. What do you mean by that?

A. Well, you know, you buy cake mix?

Q. Pre-mix?

A. Right. And then from scratch you had to go all the way.

Q. Did he do any chores to your house when you had a garden?

A. Yes. I had a garden in the back where I lived on Williams; and he also helped me in it. You know, like getting the weeds out, and things like that.

Q. All right. Now, was there any incident that you remember in your life that surprised you concerning Larry's

concern of the household with regard to giving you or offering you any money?

A. Yes, I do.

Q. Tell us about that?

A. I was short on paying my utility bill and he gave me some money to help me finish it out. My bill was fifty some dollars and he gave me thirty, as far as I can recall.

Q. 13, 14 or 15—what age was he when he did that?

A. That was the time he was working at the East Side Action Center.

.....

Q. (by Mr. Gerash) Now, from the standpoint of Larry's efficiency around the house in cooking and cleaning and helping with the smaller children and baby sitting, have you replaced him in any way? Have you replaced him? Have you replaced his services that he gave you?

A. No, I have not.

Q. What do you have to do?

A. I have to do it all myself now.

MR. GERASH: That is all I have, Your Honor.

* * *

(WHEREUPON, this concludes the portions designated to be transcribed by ordering counsel.)

* * *

REPORTER'S CERTIFICATE

(Omitted in printing)

AND AFTERWARDS, and on to-wit, the 15th day of November, A. D. 1974, the following proceedings, inter alia, were had and entered of record in said Court, to-wit:

+ + +

JUDGE CHARLES GOLDBERG

RUBY JONES

vs.

DOUGLAS HILDEBRANT, ET AL

C-39926

ORDER:
JURY RETURNS TO RESUME DELIBERATIONS

At this day come again the said jurors and resume deliberation.

* * *

ORDER:
JURY RETURN VERDICT
JURY DISCHARGED

At this day come again the said parties hereto, by their attorneys, respectively.

And thereupon, come again the said jurors, and on their oaths do say:

"We, the jury, find the issues for the plaintiff, Ruby Jones, and assess her damages at $1,500.00.

Signed C. GILBERT
foreman."

And the verdict being thus received and recorded, the jury is discharged and allowed to separate.

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Ctrm. 3

RUBY Jones,
Plaintiff,

vs.

DOUGLAS HILDEBRANT, and THE CITY AND COUNTY OF DENVER, a municipal corporation,
Defendants.

VERDICT
—filed Nov. 15, 1974

We, the jury, find the issues for the plaintiff, Ruby Jones, and assess her damages at $1,500.00.

C. E. GILBERT
FOREMAN

The above amount voted on by all members of the jury.

(THE 15th DAY OF NOVEMBER, A.D. 1974)

ORDER:
JUDGMENT ENTER

And thereupon, IT IS ORDERED BY THE COURT that Judgment enter on verdict in favor of the Plaintiff and against the Defendant in the sum of FIFTEEN HUNDRED ($1,500.00) DOLLARS, plus interest from date of filing, plus Court costs and expert witness fees.

* * *

ORDER:
PARTIES HAVE 30 DAYS TO
FILE MOTIONS

And thereupon, IT IS FURTHER ORDERED BY THE

COURT that both parties have THIRTY (30) days to file Motion for New Trial or other Motions they deem appropriate.

+ + +

(THE 15th DAY OF NOVEMBER, A.D. 1974)

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and BRIAN MORAN and THE CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants,

C–39926

JUDGMENT
—November 15, 1974

The Court having this day ordered that judgment enter herein in favor of the Plaintiff, RUBY JONES and against the Defe, in accordance with the verdict of the Jury, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, RUBY JONES, do have and recover of and from the Defendants, DOUGLAS HILDEBRANT and BRIAN MORAN and THE CITY AND COUNTY OF DENVER, a Municipal corporation, the sum of FIFTEEN HUNDRED ($1,500.00) DOLLARS, her damages so by the jury assessed, plus interest from date of filing, plus expert witness fees, together with her costs in this behalf laid out and expended, to be taxed, and have execution therefore.

+ + +

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. C–39926, Division 3

RUBY JONES,
Plaintiff,
vs.
DOUGLAS HILDEBRANT, and THE CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants.

MOTION FOR NEW TRIAL
—filed Nov. 22, 1974

COMES NOW the Plaintiff, Ruby Jones by and through her attorneys Walter L. Gerash and David K. Rees, and moves this Honorable Court to grant her a new trial on the issue of damages alone.

AS GROUNDS THEREFORE, Plaintiff states that:

1. The damages awarded by the jury in the above-captioned matter were inadequate.
2. The Court erred in dismissing Plaintiff's claim brought pursuant to 42 U.S.C. §1983.
3. The Court erred in refusing to submit to the jury, Plaintiff's tendered instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.

WHEREFORE, Plaintiff moves this Honorable Court to grant her a new trial on the question of damages only.

Respectfully submitted,
WALTER L. GERASH and
DAVID K. REES

David K. Rees
Attorney at Law
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IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. C-39926, Division 3

RUBY JONES,
Plaintiff,
vs.
DOUGLAS HILDEBRANT, ET. AL.,
Defendants.

AMENDMENT TO MOTION FOR NEW TRIAL
—filed Dec. 9, 1974

COMES NOW the Plaintiff Ruby Jones, by and through her attorneys Walter L. Gerash and David K. Rees, and hereby amends the Motion for New Trial heretofore filed with this Court by adding the additional grounds that the net pecuniary worth rule of damages is unconstitutional and the Court erred as ammatter of law in dismissing the Plaintiff's third claim for relief.

Respectfully submitted,
WALTER L. GERASH and
DAVID K. REES

David K. Rees
Attorney for Plaintiff
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IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. C-39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and THE CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants.

NOTICE OF APPEAL —filed Feb. 7, 1975

TO THE CLERK OF THE DISTRICT COURT:

COMES NOW the Plaintiff, Ruby Jones, by and through her attorneys, Walter L. Gerash and David K. Rees, and hereby gives notice pursuant to C.A.R. Rule 3, that she is appealing to the Supreme Court of Colorado the order entered in this case, January 9, 1975 denying Plaintiff's Motion for New Trial pursuant to C.R.C.P. Rule 59.

Dated February 7, 1975.

WALTER L. GERASH and
DAVID K. REES

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CERTIFICATE OF SERVICE
(Omitted in printing)

NO. 26828

RUBY JONES,
Plaintiff-Appellant,

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants-Appellees.

OPINION— filed May 24, 1976

Appeal from the District Court of the City & County of Denver

Hon. Charles Goldberg, Judge

EN BANC — JUDGMENT AFFIRMED

Walter L. Gerash,
Attorney for Plaintiff-Appellant.

Wesley H. Doan,
Joseph A. Davis,

Attorneys for Defendants-Appellees.

MR. JUSTICE HODGES delivered the Opinion of the Court.

Plaintiff-appellant Jones recovered, as the result of a jury trial, a $1500 judgment against the defendant-appellees Hildebrant and the City and County of Denver for the wrongful death of her fifteen-year old son. She appeals from this judgment solely on the damage issue. We find no error and therefore affirm the judgment of the trial court.

In her complaint, plaintiff alleged that defendant Hildebrant, while acting in his capacity as a Denver police officer, wrongfully shot and killed her son. The City and County of Denver was joined as a defendant because of its alleged liability as a principal. Her amended complaint stated three claims

for relief: (1) battery, (2) negligence, and (3) a violation of civil rights. The first two claims were based on the Colorado wrongful death statute, section 13–21–202, C.R.S. 1973. The third claim was premised on 42 U.S.C. §1983. It will be referred to as the §1983 claim in this opinion. She prayed for $1,500,000 compensatory damages and $250,000 exemplary damages.

It was admitted that defendant Hildebrant intentionally shot plaintiff's son while acting within the scope of his employment and under color of state law. Liability was denied, however, on the basis that the defendant police officer was attempting to apprehend a fleeing felon or in the alternative was acting in self-defense, and that he was using no more force than was reasonably necessary for these purposes.

Prior to trial, the court dismissed the §1983 claim, ruling that it merged with plaintiff's other claims under the Colorado wrongful death statute. In addition, the trial court ruled that the wrongful death statute did not permit the recovery of punitive damages, and it also limited plaintiff's recovery to a maximum of $45,000 because she was not a dependent of the deceased. After being instructed that plaintiff could recover only the pecuniary losses she sustained as a result of the death of her son,[1] the jury returned a verdict of $1500 in her favor.

Plaintiff asserts that the judgment should be reversed and a new trial ordered on the issue of damages because (1) her damages under the wrongful death statute were unconstitutionally restricted by the net pecuniary loss rule, (2) that her recovery was inadequate, as a matter of law, and (3) that additional damages should have been permitted under her §1983 claim because that cause of action was not limited by the pecuniary loss rule.

I.

Plaintiff-appellant asserts that this court erred in *Pierce v. Conners*, 20 Colo. 178, 37 P. 721 (1894), when it interpreted the wrongful death statute as permitting the recovery of only

[1] In accordance with our ruling in *Herbertson v. Russel*, 150 Colo. 110, 371 P.2d 422 (1962), the jury was instructed that net pecuniary loss is the financial loss sustained by the plaintiff as a result of the death of her son. Such losses would include the value of any services that he might have rendered and earnings he might have made while a minor together with any support he might have been expected to provide her after he became an adult, less the expneses she would have incurred in maintaining him.

compensatory damages for the loss of a decedent's services and support and not permitting the recovery of damages for the survivor's grief or for punitive damages. As a result, she argues that her statutory remedy has been unjustly restricted in violation of her rights under Colo. Const. Art. II, §25, and the Fourteenth Amendment of the United States Constitution. Alternatively, she argues that "net pecuniary loss" should be defined to include the pecuniary value of her loss of comfort, society and protection.

This court has rejected similar arguments on numerous occasions and has adhered to the net pecuniary loss rule. *See, e.g., Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962); *Herbertson v. Russel*, 150 Colo. 110, 371 P.2d 422 (1962); *Denver & R.G.R.R. v. Spencer*, 27 Colo. 313, 61 P. 606 (1900). In response to the argument that the rule unjustly restricts her statutory remedy, we stated in *Herbertson* that

> "[t]he suggestion that this Court should depart from its prior pronouncements defining the measure of damages recoverable under our wrongful death statute would do utter violence to the well-established rule of statutory construction that when a legislature repeatedly reenacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent, and in such circumstances it must be considered that the particular statute is re-enacted with the understanding that there be adherence by the judiciary to its former construction. . . ."

Also, in *Kogul*, we specifically held that the net pecuniary loss rule does not allow for the compensation of parental grief.

We therefore adhere to the precedent firmly established in this state and reject the defendant's request to overrule our previous pronouncements on the law in this state on the "net pecuniary loss" rule.

II.

The plaintiff also maintains that the verdict returned by the jury is inadequate, as a matter of law, on the basis of the evidence of her son's habits of industry and disposition to help her. Based on our review of this recond, we cannot conclude that the verdict is "grossly and manifestly inadequate" as to "clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations." *See Kogul v. Sonheim, supra.*

The evidence of plaintiff's damages was vague and insub-

stantial. She testified that her son occasionally helped her with household chores, that he once worked at the East Side Action Center, and that from his earnings there, he once gave her $30 to pay a utility bill. No documentary evidence of funeral expenses was apparently offered to the jury, though some evidence tended to show that these expenses were approximately $1000. Under these circumstances, the trial court refused to set aside the verdict of the jury,[2] and to order a new trial on the damage issue alone. We agree with the trial court's ruling.

III.

Plaintiff-appellant next contends that her §1983 claim should not have been dismissed because it would have permitted her to recover damages not otherwise available under the state wrongful death action, including punitive damages and damages for mental anguish and loss of society. She advances what are, in reality, four distinct theories to support her position.

Her first theory, although confusingly stated, seems to be that the state wrongful death statute recognizes her claim to a civil right to her son's life, which was denied her without due process of law through his wrongful killing. This argument, in our view, misperceives the meaning of either "liberty" or "property" as protected by the Due Process Clause.

The United States Supreme Court in *Paul v. Davis*, ___ U.S. ___, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), has recently addressed this question in an analogous §1983 case where the issue was whether or not a person's right to sue for damages to his reputation under state law created a right to "property" or "liberty" which was unconstitutionally denied him when a state officer allegedly defamed him. The Court held that such a right to sue for damages did not create a right which could be denied solely by the underlying act of defamation. Accordingly, the Court distinguished the right to sue from other property rights, such as, a driver's license:

> "In each of these cases [e.g., the suspension of a driver's license], as a result of the state action compained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the 'liberty' or 'property' recognized in those decisions. Kentucky law does not extent to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioner's action. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the state's laws."

[2] *Compare Kogul v. Sonheim, supra*, in which this court upheld an award for $700 for the wrongful death of a three-year old child.

The logic behind the Supreme Court's distinction is evident. The right to sue becomes a right protected by the Fourteenth Amendment only when the statutorily guaranteed access to the courts is denied. Therefore, where, as here, the state allows a plaintiff to bring her suit, she is not deprived of any of her civil rights without due process of law.[3]

Secondly, the plaintiff argues that although §1983 does not expressly create a wrongful death action for a violation of civil rights, 42 U.S.C. §1988 authorizes the incorporation into federal law of state wrongful death remedies to vindicate violations of civil rights that result in death. She further contends that only that part of the state law granting her this right to sue should be incorporated, but not the state law relating to damages.

We agree with the plaintiff that the federal courts have commonly ruled that §1988 permits the incorporation of the states' non-abatement statutes[4] and wrongful death statutes[5] into §1983 actions in order to effectually implement the

[3] *Accord, Jones v. Murphy*, 392 F. Supp. 641 (E.D. Ala. 1975), which held that an administratrix's rights under the Alabama wrongful death statute was not a property right protected by the Fourteenth Amendment.

[4] The following courts have held that §1983 actions which accrued during the lifetime of the decedent do not abate at his death but survive to his estate according to state law: *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Hall v. Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Troutman v. Johnson City*, 392 F.Supp. 556 (E.D. Tenn. 1973); *Javits v. Stevens*, 382 F.Supp. 131 (S.D. N.Y. 1974). *See also* Annot., 88 A.L.R. 2d 1153.

[5] The following cases have incorporated the states' wrongful death remedies into §1983 actions so that a personal representative can bring actions in behalf of certain designated beneficiaries or so that the beneficiaries themselves may bring an action

policies of that legislation.[6] For example, the leading case, *Brazier v. Cherry*, *supra*, n. 4, allowed a surviving widow to recover damages sustained by the decedent during his lifetime and damages sustained by his survivors as a result of his wrongful death by incorporating the Georgia survival statutes. The court reasoned that the civil rights legislation was designed to protect citizens not only from violence which would cripple but also from violence that would kill. However, because no express provision was established for the survival of §1983 claims where death occurs, the court held that Congress must have intended to adopt as federal law the forum state's law on survival by means of §1988. The Supreme Court also concluded that 42 U.S.C. §1986, which provides for a limited survival action for suits brought under §1985 which relates to conspiracies to deprive others of their civil rights, should not be interpreted as demonstrating a Congressional intent to exclude survival remedies from other portions of the Act. Rather, it held that, to be consistent with the manifest Congressional intent to provide a civil rights remedy even when death occurs, the omission of express survival remedies in §1983 was indicative of Congressional intent to incorporate state remedies.

We therefore conclude that Colorado's wrongful death remedy would be engrafted into a §1983 action if brought in a federal court. However, because the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the §1983 claim should be dismissed.[7]

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in their own right: *Wolfer v. Thaler*, 525 F.2d 977 (5th Cir. 1976); *Spence v. Staras*, *supra*, n. 4; *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Brazier v. Cherry*, *supra*, n. 4; *Smith v. Wickline*, 396 F. Supp. 555 (W.D. Okla. 1975); *Jones v. Murphy*, *supra*, n. 3; *Pollard v. United States*, 384 F. Supp. 304 (M.D. Ala. 1974); *Bailey v. Harris*, 377 F. Supp. 401 (E.D. Tenn. 1974); *Smith v. Jones*, 379 F. Supp. 201 (1973), *sum. aff'd.*, 497 F.2d 924; *Love v. Davis*, 353 F. Supp. 587 (W.D. La. 1973); *Galindo v. Brownell*, 255 F. Supp. 930 (S.D. Cal. 1966).

[6] In *Moore v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), the Court held that §1988 was not intended to be a basis for an independent cause of action but it was designed only to permit the incorporation of state remedies to effectuate causes of action that arise in other parts of the civil rights act. It then cited *Brazier* with apparent approval as an example of the proper incorporation of state law under §1988. Consistently, the Court in *Moragne v. United States Marine Lines*, *infra.*, n. 10, characterized a wrongful death action was essentially remedial because it does not impose an additional duty of care on the tort-feasor.

[7] The suit under the state claim was, in fact, a broader remedy because it allowed a recovery against the City and County of Denver, which because of its status as a municipality, would not probably be liable under §1983. *See Moor v. County of Alameda*, supra, n. 6, and *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply.[8] Though not directly ruling on this issue, federal courts have implicitly adopted the state limitations on wrongful death damages. In *Smith v. Wickline*, *supra*, n. 5, the Oklahoma wrongful death remedy was adopted even though it did not allow the recovery of punitive damages. In *Galindo v. Brownell*, *supra*, n. 5, the California wrongful death statute was used even though it only allowed the recovery of pecuniary losses by a parent.[9] Finally, in *Jones v. Murphy*, *supra*, n. 3, only punitive damages were allowed because the Alabama law did not allow compensatory or actual damages.

Plaintiff Jones' third theory is that a federal wrongful death remedy impliedly exists in §1983, independent of state wrongful death remedies. Though the United States Supreme Court has ruled that federal wrongful death remedies impliedly exist in some areas [10] of the law, we do not believe that such a remedy exists with §1983 claims. This belief is based on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts.[11]

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[8] Our ruling thus accords with what appears to be the federal policy of wholly incorporating state wrongful death remedies when incorporation of state law is the Congressional intent. For instance, in *The Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959), the Court observed that the "policy expressed by a State Leigslature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

[9] *See also Spence v. Staras*, *supra*, n. 4, where the Illinois wrongful death remedy, which permitted the recovery of only pecuniary losses, was incorporated into a §1983 suit. The court there allowed the recovery of punitive damages but its reasons for doing so are unclear. Most likely, the court allowed such damages in connection with another claim based on the damages sustained by the decedent while he was alive, damages which the court noted were recoverable under Illinois law.

[10] For instance, in *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Court held that an implied action for wrongful death based on unseaworthiness is maintainable under federal maritime law by the decedent's dependents. In *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), the Court began to spell out some of the parameters of the remedy when it ruled that the wrongful death remedy would allow the recovery of pecuniary losses, funeral expenses and loss of society.

[11] Were we to rule otherwise, this court would have to fashion a remedy for a

The plaintiff's fourth and final theory for obtaining a separate recovery under her §1983 claim is that she was deprived of her own constitutional rights. While not forthrightly articulating just what those rights are, she alleges in her complaint that her rights were violated because her child's right to life, his right to freedom from physical abuse and intimidation, and his right to equal protection of the laws were violated.

The deprivations, however, are really those of her son. The federal courts have consistently held that one may not sue for the deprivation of another's rights under §1983, and that a cause of action can be maintained only by the "person injured." *See Hall v. Wooten, supra,* n. 4, and *Javits v. Stevens, supra,* n. 4, and cases cited therein. She therefore cannot sue in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action.

Furthermore, the state did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child-rearing which are involved in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that §1983 was not designed to compensate for these collateral losses resulting from injuries to others. Otherwise, damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a "family" of close friends. The interests protected by §1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute.

The judgment is affirmed.

MR. CHIEF JUSTICE PRINGLE and MR. JUSTICE GROVES dissent.

MR. JUSTICE KELLEY does not participate.

No. 26828—*Jones v. Hildebrant*

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federal right bottomed on a federal statute that itself has no provisions concerning the class of beneficiaries, the proper parties to bring suits, and the type of damages. For example, it is still unclear in a *Moragne* wrongful death action whether such an action is limited to dependents only. *See, e.g., Hamilton v. Canal Barge Co.,* 395 F. Supp. 978 (E.D. La. 1975).

MR. CHIEF JUSTICE PRINGLE dissenting:

I respectfully dissent.

I do not believe that Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death applies to actions founded upon 42 U.S.C. §1983 (1970).

I am authorized to say that MR. JUSTICE GROVES joins in this dissent.

IN THE SUPREME COURT
OF THE STATE OF COLORADO

RUBY JONES,
Petitioner,

26828 *v.*

DOUGLAS HILDEBRANT and THE CITY AND COUNTY OF DENVER, a municipal corporation,
Respondent.

Appeal from the District Court City and County of Denver

ORDER DENYING REHEARING—June 21, 1976

On consideration of the petition of petitioner for rehearing in said cause, it is this day ordered that said petition be, and the same hereby is, denied.

By the Court. En Banc. June 21, 1976.
Mr. Justice Groves would grant.

STATE OF COLORADO, ss.

IN THE SUPREME COURT THEREOF.

THE PEOPLE OF THE STATE OF COLORADO,
To the District Court of City and County of Denver and State of Colorado, Greeting:

WHEREAS, lately in the District Court of City and County of Denver State aforesaid, in a certain cause therein pending between Ruby Jones, Plaintiff, and Douglas Hildebrant, et al., Defendants, the judgment of said District Court in said cause rendered was against the said plaintiff.

AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, as an appeal from said District Court.

AND WHEREAS, at the April Term of our Supreme Court, in the year of our Lord one thousand nine hundred and seventy-six, the said cause came on to be heard before our said SUPREME COURT on the 24th day of May, A.D. 1976, (the same being one of the Juridical days of said term) and the following proceedings were had and entered of record in said cause, to-wit:

RUBY JONES,
Plaintiff-Appellant,
No. 26828 *vs.*
DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants-Appellees.

Appeal from the District Court City and County of Denver (C39926)

This cause having been brought to this court as an appeal to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

It is this day ordered and adjudged that the judgment of said District Court be, and the same hereby is, affirmed, and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said appeal.

Now, Therefore, this cause is remanded to you, the said District Court, and in for the said City and County of Denver and State aforesaid, that such further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein.

WITNESS the HONORABLE EDWARD E. PRINGLE, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City of Denver, this 23rd day of June, A.D., 1976.

RICHARD D. TURELLI,
Clerk Supreme Court.

By _____
Deputy.

IN THE SUPREME COURT
STATE OF COLORADO

No. 26828

RUBY JONES, *Plaintiff-Appellant,* *v.* DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation, *Defendants-Appellees.*	APPEAL FROM THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER The Honorable Charles Goldberg, Judge

MOTION FOR RECALL OF MANDATE
—Filed Aug. 25, 1976

COMES NOW, the Plaintiff-Appellant, Ruby Jones, by and through her attorney, WALTER L. GERASH, P.C., and moves this Court for an Order recalling the mandate issued by this Court in the within action,

AND AS GROUNDS AND IN SUPPORT THEREOF, states as follows:

1. That this Court issued its Opinion in the within action affirming the Colorado Court of Appeals decision and rejecting the arguments raised by Plaintiff.

2. That Plaintiff duly filed a Petition for Rehearing on said decision.

3. That this Court denied Plaintiff's Petition for Rehearing.

4. That this Court has issued its mandate to the trial court directing it to act in accordance with its decision in the within action.

5. That Plaintiff now intends to appeal the decision of this Court to the United States Supreme Court.

6. That as a prerequisite for said appeal to the United

States Supreme Court, the mandate issued by this Court should be recalled.

WHEREFORE, Plaintiff prays that this Honorable Court recall its mandate issued in the within action, and for such other, further, or additional relief as the Court deems just and proper.

Dated this 25th day of August, 1976.

WALTER L. GERASH, P.C.
Suite 2317, 1700 Broadway
Denver, CO 80202
222-8574

By _____
Allan Abelman #7178
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE
(Omitted in printing)

IN THE SUPREME COURT OF THE
STATE OF COLORADO

RUBY JONES,
Plaintiff-Appellant,

26828 *v.*

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER,
a municipal corporation,

Appeal from the District Court in and for the City and County of Denver

ORDER DENYING MOTION FOR
RECALL OF MANDATE

Upon consideration of the motion for recall of mandate, it is this day ordered that said motion be, and the same hereby is, denied.

By the Court, En Banc, August 30, 1976

In the Supreme Court of the United States

No. 76-5416

RUBY JONES,
Petitioner,

v.

DOUGLAS HILDEBRANT, et al.

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Colorado.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 17, 1977